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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RUDD MILLER, Plaintiff, v. WELLS FARGO BANK, N.A., Defendant.	Case No. CV 14-03392 DDP (AJWx) **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS** [Dkt. No. 40]

Presently before the Court is Defendant Wells Fargo Bank, N.A. ("Wells Fargo")'s Motion to Dismiss the First Amended Complaint (the "Motion"). (Mot., Dkt. No. 40.) Having considered the parties' submissions, the Court GRANTS in part and DENIES in part the Motion and adopts the following order.

I. BACKGROUND

On or about October 30, 2007, Plaintiff Rudd Miller ("Miller") and his wife, Maria Miller ("Maria") (collectively, the "Millers") obtained a loan from World Savings Bank, FSB ("Wold Savings"), secured by the Millers' residence in Thousand Oaks, CA. (First Amended Complaint ("FAC"), Dkt. No. 23, ¶ 16.) On or about July 7, 2011, Wells Fargo caused to be recorded a Notice of Default against

the Millers' residence. (Id. ¶ 17 & Ex. 1.) The Notice of Default indicated that Wells Fargo was the beneficiary and servicer to the loan.[1] (Id.) In 2012, the Millers applied for a loan modification. (Id. ¶ 18.) In June 2012, Wells Fargo reviewed the Millers' loan modification application and approved the Millers for a Trial Period Plan ("TPP") pursuant to the Home Affordable Modification Program ("HAMP"). (Id. ¶ 19 & Ex. 2.) Miller alleges that, under the terms of the TPP, Wells Fargo promised to permanently modify the Millers' loan pursuant to HAMP guidelines after the Millers made the three modified monthly loan payments specified in the TPP. (Id. ¶ 19.)

On June 16, 2012, Maria passed away. (Id. ¶ 21.) Miller continued to comply with the terms of the TPP by making the required three payments. (Id. ¶ 20.) Miller alleges that on or around October 2012, Wells Fargo issued the Millers a HAMP Modification Agreement that listed both Miller's name and his wife's name. (Id. ¶ 22 & Ex. 3.) Miller alleges that Wells Fargo representatives advised him that, due to his wife's death, a new HAMP Modification Agreement would be issued to him that solely reflected Miller's name on the loan, rather than both his and his wife's names. (Id. ¶ 23.) Miller alleges that Wells Fargo representatives told him to continue making payments per the original HAMP Modification Agreement in the meantime. (Id.) Miller alleges that he continued to make monthly payments pursuant

[1] The FAC does not specify how Wells became the successor in interest to World Savings, but Wells Fargo's Motion indicates that Wold Savings changed its name to Wachovia Mortgage, FSB on December 31, 2007. (Mot. at 1-2.) On November 1, 2009, Wachovia Mortgage, FSB became a division of Wells Fargo. (Id.)

to the original HAMP Modification Agreement, and that he made payments from October 2012 through February 2012. (Id. ¶ 25.)

Miller alleges that after February 2012, Wells Fargo refused to accept his monthly payments. (Id. ¶ 26.) Miller alleges that Wells Fargo did not follow through on its representations that Miller would be issued a new HAMP Modification Agreement and that Miller could continue making payments under the original HAMP Modification Agreement in the interim. (Id.) On June 17, 2014, Wells Fargo cause to be recorded a Notice of Trustee's Sale against Miller's residence. (Id. ¶ 27 & Ex. 4.) There was a foreclosure sale scheduled for Miller's property on December 8, 2014. (Id. ¶ 28.)

Miller alleges claims for: (1) violation of Cal. Civ. Code § 2924.11(b), (2) breach of contract, (3) breach of the implied covenant of good faith and fair dealing, (4) promissory estoppel, (5) negligence, (6) fraud and intentional misrepresentation, (7) violation of Cal. Bus. Prof. Code § 17200, and (8) declaratory and injunctive relief. (See generally FAC.) Miller requests compensatory and punitive damages, statutory penalties, specific performance, injunctive relief prohibiting foreclosure on his residence, and attorney's fees and costs. (Id.) Wells Fargo moves to dismiss all claims.

II. LEGAL STANDARD

A 12(b)(6) motion to dismiss requires the court to determine the sufficiency of the plaintiff's complaint and whether or not it contains a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Under Rule 12(b)(6), a court must (1) construe the complaint in the light

most favorable to the plaintiff, and (2) accept all well-pleaded factual allegations as true, as well as all reasonable inferences to be drawn from them. See Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001), amended on denial of reh'g, 275 F.3d 1187 (9th Cir. 2001); Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th Cir. 1998).

In order to survive a 12(b)(6) motion to dismiss, the complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556U.S. 662, 663 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678. Dismissal is proper if the complaint "lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008); see also Twombly, 550 U.S. at 561-63 (dismissal for failure to state a claim does not require the appearance, beyond a doubt, that the plaintiff can prove "no set of facts" in support of its claim that would entitle it to relief). A complaint does not suffice "if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 556). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. The Court need not accept as true "legal conclusions merely because they are cast in the form of factual allegations." Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003).

III. DISCUSSION

A. Violation of California Civil Code § 2924.11(b)

California Civil Code § 2924.11 is part of the Homeowners' Bill of Rights ("HBOR"), and it forbids a mortgage servicer from recording a notice of default under certain circumstances. Miller alleges a violation of part (b) of Section 2924.11, which provides that if a foreclosure prevention alternative has been approved in writing after the recordation of a notice of default, a mortgage servicer may not then record a notice of trustee's sale or conduct a trustee's sale if "(1) [t]he borrower is in compliance with the terms of a written trial or permanent loan modification, forbearance or repayment plan," or "(2) [a] foreclosure prevention alternative has been approved in writing by all parties . . and proof of funds or financing has been provided to the servicer." Cal. Civ. Code § 2924.11(b).

Wells Fargo argues that (1) Section 2924.11(b) is not applicable to Miller's circumstances because it only applies after a borrower has been denied a loan modification, and (2) even if it did apply, Miller failed to satisfy the requirements because Miller was not in compliance with the terms of the HAMP Modification Agreement when the Notice of Trustee's Sale was recorded in May 2013.

Wells Fargo's primary argument is that that Section 2924.11(b) applies only when a mortgage servicer has denied a first lien loan modification application. (See Mot. at 2.) However, Wells Fargo cites to a version of Section 2924.11 that is not yet in effect. The current version of Section 2924.11(b), effective January 1, 2013, provides borrowers with protection in the case of an approved

foreclosure prevention alternative, as described above. See 2012 Cal. Stat. ch. 86, § 14. The version of Section 2924.11(b) that Wells Fargo references in its Motion is not effective until January 1, 2018. See 2012 Cal. Stat. ch. 86, § 15; see also Cal. Civ. Code § 2924.11(j) ("This section shall remain in effect only until January 1, 2018 . . ."). Therefore, Wells Fargo's arguments in this respect are inapposite. Section 2924.11(b) is applicable to Miller's circumstances, as alleged in the FAC, because Miller was approved for a modification and entered into the TPP after notice of default, and further because Miller alleges that he complied with the TPP in making all required payments.

The FAC alleges that Miller complied with the terms of a written trial or permanent loan modification plan. Miller made all three required payments under the TPP, and he made continued payments under HAMP until Wells Fargo refused to accept further payments. Furthermore, a foreclosure prevention alternative - the TPP - was approved in writing after the recordation of a notice of default on Miller's residence. Accordingly, Miller has stated a plausible claim under section 2924.11(b).

B. Breach of Contract

Miller also alleges a claim for breach of contract. The elements of a breach of contract claim are: (1) the existence of a contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) damages. Oasis West Realty, LLC v. Goldman, 51 Cal.4th 811, 821 (2011).

Wells Fargo contends that the breach of contract claim should be dismissed because the FAC "does not identify what agreement Wells Fargo breached or specifically how Wells Fargo breached it."

(Mot. at 3.) Wells Fargo further argues that, regardless of whether the contract at issue is the June 2013 TPP or the October 2012 HAMP Modification Agreement, Miller has not pled facts showing Wells Fargo breached either agreement. (Id. at 3-4.) Wells Fargo also argues that the TPP was a "temporary" agreement that lasted only through September 2012, the month of the third (and last) required payment under the conditions of the TPP. (Id.)

Miller, in his Opposition, clarifies that the contract Wells Fargo allegedly breached is the TPP. (See Opp'n at 9.) Miller argues that the clear language of the TPP itself as well as HAMP guidelines, demonstrate that the TPP did constitute a contract between Miller and Wells Fargo. (Id.) Miller states that he complied with the terms of the TPP, and Wells Fargo thus breached the contract by failing to offer him a permanent loan modification. (Id.)

The Ninth Circuit has explicitly held that a TPP under the HAMP framework is in itself a contract, regardless of whether the parties to the TPP subsequently agree to a permanent modification agreement. Corvello v. Wells Fargo Bank, NA, 728 F.3d 878, 883 (9th Cir. 2013) (adopting the Seventh Circuit's reasoning in Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547 (7th Cir. 2012)); see also Romero v. Nationstar Mortgage LLC, No. 14-CV-02954-TLN-DAD, 2015 WL 4393969, at *4 (E.D. Cal. July 15, 2015) ("One of the guiding principles that have emerged from recent cases interpreting HAMP is that a contract for a loan modification is created upon successful completion of a TPP.") (citing cases). Specifically, the "natural and fair interpretation of the TPP is that the servicer must send a

signed Modification Agreement offering to modify the loan once borrowers meet their end of the bargain." Id.

If Miller satisfied the terms of the TPP, then Wells Fargo had an obligation to offer Miller a permanent loan modification. Although it appears Miller was sent some form of loan modification agreement that included both him and his spouse in the contract, Wells Fargo allegedly never fulfilled its promise in sending Miller a revised loan modification agreement that listed only Miller as the borrower. Such circumstances could be interpreted to mean that Wells Fargo did not in good faith fulfill its obligations under the TPP. See Bushell v. JPMorgan Chase Bank, N.A., 220 Cal. App. 4th 915, 929 (2013) ("Chase was required to offer plaintiffs a good faith permanent modification of their loan given that plaintiffs have alleged they complied with the TPP and qualified under HAMP"). Accordingly, Miller has adequately pled his breach of contract claim.

C. Implied Covenant of Good Faith and Fair Dealing

"Under California law, which applies, all contracts contain an implied covenant of good faith and fair dealing. This covenant requires each contracting party to refrain from doing anything to injure the right of the other to receive the benefits of the agreement." San Jose Prod. Credit Ass'n v. Old Republic Life Ins. Co., 723 F.2d 700, 703 (9th Cir.1984) (internal quotations omitted). The covenant supplements the express contractual terms in order to prevent a contracting party from acting in a way that, although it does not technically breach the contract, frustrates the other party'es rights to the benefits of the contract. Love v. Fire Ins. Exch., 221 Cal. App. 3d 1136, 1153 (1990).

Wells Fargo argues that Miller's breach of implied covenant claim must fail because (1) the FAC fails to allege facts showing that a contract was formed, and (2) even if a contract existed, California law forbids breach of implied covenant claims that are "superfluous" to a breach of contract claim arising from the same breach. (Mot. at 4-5.)

As addressed, above, the Ninth Circuit has held that a TPP does constitute a contract. The FAC alleges a breach with respect to the TPP. It does not allege that a permanent loan modification was agreed to - rather, it alleges that the HAMP Modification Agreement was not provided pursuant to the terms of the contract. The FAC also alleges that Wells Fargo unfairly interefered with Miller's right to receive the benefits of the TPP - namely, the offer of a permanent loan modification.

As for Wells Fargo's second argument, Wells Fargo argues that Miller's claim should be dismissed because it is substantively identical to his claim for breach of contract. However, the case Wells Fargo cites to in support of its argument is not analogous to the present case. See Guz v. Bechtel Nat'l, Inc., 24 Cal.4th 317, 327 (2000). Guz was an employment case that concerned a breach of contract claim where the employment contract specified an employee could be terminated for good cause. Id. at 326. The employee's breach of the implied covenant claim concerned essentially the same issue, whether the employer breached the covenant of good faith and fair dealing when it terminated the plaintiff in bad faith. Id. at 326-27. Therefore, the court held, the breach of implied covenant claim added nothing to the breach of contract claim, because "[i]n the employment context, an implied covenant theory affords no

separate measure of recovery" other than the contractual recovery itself. Id. at 352. However, Guz was an employment law case, and the court specifically noted that "[w]e do not suggest the covenant of good faith and fair dealing has no function whatever in the interpretation and enforcement of employment contracts . . . for example, the covenant might be violated if termination of an at-will employee was a mere pretext to cheat the worker out of another contract benefit to which the employee was clearly entitled, such as compensation already earned. Id. at 353 n.18. Here, the facts as pled support a claim for breach of the implied covenant. Miller was sent a HAMP Modification Agreement; however, the Agreement included his wife, who had previously passed away. An argument could be made that Wells Fargo was obliged to send Miller a HAMP Modification Agreement in Miller's name only, and that while Wells Fargo had technically complied with the terms of the TPP by providing a permanent loan modification offer, it should have provided Miller with a revised offer when it learned Miller's wife had passed away.

D. Promissory Estoppel

Miller also alleges a claim for promissory estoppel. Under the doctrine of promissory estoppel, "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Kajima/Ray Wilson v. Los Angeles Cnty. Metro. Transp. Auth., 23 Cal. 4th 305, 310 (2000). The elements of promissory estoppel claim are: "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the

promise is made; (3)[the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." Advanced Choices, Inc. v. Dep't of Health Servs., 182 Cal. App. 4th 1661, 1672 (2010).

Wells Fargo argues that Miller cannot bring his promissory estoppel claim because (1) it is premised on the same allegations as his breach of contract claim, and (2) he has not pled detrimental reliance because he was already legally obligated to make the payments on his loan. (Mot. at 5-6.)

A plaintiff is allowed to plead alternative theories of a case. See Fed. R. Civ. P. 8(d)(2)-(3) (allowing for pleading of alternative claims and for inconsistent claims); Putnam v. Putnam Lovell Grp. NBF Securites, Inc., No. C 05-1330 CW, 2006 WL 1821207, at *7 (N.D. Cal. June 30, 2006) (allowing a breach of implied contract claim and promissory estoppel claim to proceed as alternative claims since "plaintiffs are allowed to plead mutually exclusive claims in the alternative, but are not allowed to recover on inconsistent theories"). Wells Fargo cites to Fontenot v. Wells Fargo Bank, N.A., which it contends stands for the proposition that Miller cannot bring a promissory estoppel claim based on an express term in a contract. See Fontenot v. Wells Fargo Bank, N.A., 198 Cal. App. 4th 256, 275 (2011). However, at this stage of the proceedings, it is unclear what the terms of the TPP required. It is possible that Wells Fargo fulfilled its obligations under the contract by providing the original HAMP Modification Agreement that included both Miller and his wife; accordingly, providing a revised modification agreement might not be expressly required by the contract. While Wells Fargo may still challenge its obligations

under the TPP, Miller should be allowed to plead an alternative promissory estoppel claim. See Rowland v. JPMorgan Chase Bank, N.A., No. C 14-00036 LB, 2014 WL 992005, at *8 (N.D. Cal. Mar. 12, 2014) ("because Defendants may still challenge the [Plaintiffs'] breach of contract claim, their promissory estoppel claim can remain").

Wells Fargo also argues that the promissory estoppel claim fails because Miller has failed to plead facts supporting detrimental reliance. Wells Fargo argues that Miller only alleges that he continued to may payments on his loan, and that this in itself cannot constituted detrimental reliance because Miller was already obliged to make those payments either pursuant to the alleged HAMP Modification Agreement or his original promissory note. (Mot. at 6.) Under the doctrine of promissory estoppel, "a promisor is bound when he should reasonably expect a substantial change of position, either by act of forbearance, in reliance on his promise, if injustice can be avoided only by its enforcement." Youngman v. Nev. Irrigation Dist., 70 Cal.2d 240, 249 (1969). Here, the FAC and Miller's Opposition brief merely allege that Miller relied on Wells Fargo's promise to provide a revised HAMP Modification Agreement by continuing to make payments on the loan. Because the FAC does not contain facts showing that Miller relied on Wells Fargo's promise in any way other than continuing to make payments, Miller has not pled facts supporting detrimental reliance. Compare Beck v. Wells Fargo Home Mortgage, N.A., No. 10-CV-2150 BEN NLS, 2010 WL 5340563, at *2 (S.D. Cal. Dec. 10, 2010) (holding that making payments plaintiff was already obligated to make did not constitute detrimental reliance) with West v.

JPMorgan Chase Bank, N.A., 214 Cal. App. 4th 780, 805 (2013) (summarizing cases where courts found detrimental reliance when plaintiffs decided to forego pursuing other remedies for default and refrained from attempting to sell their homes).

E. Negligence

The elements of a negligence claim are: (1) the existence of a duty to exercise due care, (2) breach of that duty, (3) causation, and (4) damages. Merrill v. Navegar, Inc., 26 Cal.4th 465, 500 (2001). The "existence of a duty of care owed by a defendant to a plaintiff is a prerequisite to establishing a claim for negligence." Nymark v. Heart Fed. Savings & Loan Assn., 231 Cal.App.3d 1089, 1095 (1991).

Wells Fargo contends that the FAC fails to state a claim for negligence because (1) Miller cannot recover in tort for an act that is essentially a breach of contract, and (2) Wells Fargo does not owe Miller a duty of care beyond its role as a lender.

Courts have generally held that, under California law, a lender does not owe a fiduciary duty to a borrower. See , e.g., Walters v. Fidelity Mortg. of California, 730 F. Supp. 2d 1185, 1205 (E.D. Cal. 2010). Courts have held so in circumstances where a loan servicer offers to modify a borrowers loan, reasoning that the servicer's "involvement in the loan transaction does not exceed the scope of its conventional role as a lender of money." Deschaine v. IndyMac Mortg. Servs., 2014 U.S. Dist. LEXIS 8541, at *17 (E.D. Cal. Jan. 22, 2014) (internal quotation marks omitted); see also Nymark v. Heart Fed. Sav. & Loan Assn., 231 Cal. App. 3d 1089, 1096 (1991).

However, the rule is not absolute, and courts have found fiduciary duty in certain circumstances. In California, court have employed a six factor test to determine whether a financial institution owes a duty of care to a borrower. The court considers "[1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm." Nymark, 231 Cal. App. 3d at 1098 (citing Biakanja v. Irving, 49 Ca.2d 647 (1958)). Under some circumstances, these factors may be met in the context of loan modification discussions between lenders and borrowers. See, e.g. Robinson v. Bank of Am., No. 12-CV-494-RMW, 2012 WL 1932842, at *7 (N.D. Cal. May 29, 2012); Ansanelli v. JP Morgan Chase Bank, N.A., No C 10-3892 WHA, 2011 WL 1134451, at *7 (N.D. Cal. Mar. 28, 2011); Watkinson v. MortgageIT, Inc. , No. 10-CV-327-IEG, 2010 WL 2196083 (S.D. Cal. June 1, 2010); Garcia v. Ocwen Loan Servicing, LLC , No. C 10-290 PVT, 2010 WL 1881098, at *1-3. (N.D. Cal. May 10, 2010).

There is currently a split in California courts as to whether lenders owe borrowers a duty of care in processing a loan modification. One court has held that lenders have a duty of care to reasonably process a loan modification application where it is foreseeable that failure to do so will result in significant harm to the borrower. Alvarez v. BAC Home Loans Servicing, L.P., 228 Cal.App.4th 941, 948 (2014) (holding that lenders have a "duty to use reasonable care in the processing of a loan modification")

However, other courts have concluded that lenders do not owe a duty of care when considering a residential loan modification. Lueras v. BAC Home Loans Servicing, LP, 221 Cal. App. 4th 49, 68 (2013) (holding that the defendant banks "did not have a common law duty of care to offer, consider, or approve a loan modification, or to offer [the plaintiff] alternatives to foreclosure.") As noted above, federal district courts in California have also reached different conclusions regarding this issue.

At this stage of the proceedings, the balance of these factors suggests that Wells Fargo did owe Miller a duty of care under the circumstances. First, the loan modification was intended to affect Miller, as it would determine whether Miller would be able to keep his home. Second, the potential harm to Miller from the failure to issue a revised loan modification as well as the alleged assurances that a revised document would be issued was readily foreseeable, as Miller's reliance on the alleged statements would result in eventual default and foreclosure. Third, the injury to Miller was certain, in that a loan modification was never agreed to and Wells Fargo initiated foreclosure proceedings on his residence. Fourth, there was a close connection between Wells Fargo's conduct and the injury suffered, since Wells Fargo's alleged failure to provide a revised loan modification agreement precipitated the foreclosure proceedings. As for the fifth factor, moral blame, it is unclear whether it would attach to Wells Fargo's alleged conduct at this stage of the proceedings. But see Alvarez, 228 Cal. App. 4th at 949 (stating that "[t]he borrower's lack of bargaining power coupled with conflicts of interest that exist in the modern loan servicing industry provide a moral imperative that those with the

controlling hand be required to exercise reasonable care in their dealings with borrowers seeking a loan modification.”) Finally, discouraging lenders from misrepresenting to borrowers that a loan modification offer would be issued imminently while at the same time deciding to foreclose is consistent with the federal government’s policy of facilitating loan modifications through HAMP as well as state-level policies encouraging the offer of loan modifications and other foreclosure alternatives. See, e.g., Cal. Civ. Code § 2923.6 (establishing a scheme that encourages lenders to offer loan modifications to borrowers). Thus, five of the six Nymark/Biakanja factors weigh in favor of imposing a duty of care on Wells Fargo in the present circumstances.

F. Fraud

The elements of a fraud claim are : (1) a false misrepresentation of material fact; (2) the defendant's knowledge of its falsity; (3) intent to defraud; (4) justifiable reliance; and (5) resulting damage.” Segura v. Wells Fargo Bank, N.A., No. CV–14–04195–MWF (AJWx), 2014 WL 4798890, at *14 (C.D. Cal. Sept. 26, 2014) (citing Lazar v. Superior Court, 12 Cal.4th 631, 638 (1996)). In addition, Federal Rule of Civil Procedure 9(b) requires plaintiffs to plead fraud claims with particularity; specifically, plaintiffs must allege “the who, what, when, where, and how of the misconduct charged.” Vess v. Ciba–Geigy Corp., 317 F.3d 1097, 1106 (9th Cir.2003) (internal quotation marks omitted).

Here, Miller has not sufficiently alleged the “who,” “when,” and “where” of Wells Fargo’s conduct. The FAC alleges that “Wells Fargo representatives advised Plaintiff that due to his wife’s death, a new HAMP Modification Agreement that solely reflects

Plaintiff's name on the loan would be issued, but to proceed with making payments per the HAMP Modification Agreement." FAC ¶ 23. It does not allege who made these statements to Miller, when they were made, and where they were made. Miller's Opposition brief states that Wells Fargo's communications came in the form of a letter and in various phone conversations, and were made by multiple "customer relation managers." Opp. at 14. These facts are not alleged in the FAC, and further, they are not sufficient to satisfy the Rule 9(b) pleading standard. Accordingly, Miller has not alleged his fraud claim with sufficient particularity.

G. Violation of California Business and Professions Code § 17200

California's Unfair Competition Law ("UCL") prohibits any "unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. The UCL incorporates other laws, and therefore violations of other laws may be treated as unfair competition under the "unlawful" prong of the UCL. See Kasky v. Nike, Inc., 27 Cal.4th 939, 949 (2002). A business practice may also be "unfair or fraudulent in violation of the UCL even if the practice does not violate any law." Olszewski v. Scripps Health, 30 Cal.4th 798, 827 (2003). "Fraudulent" business practices must be pled with particularity under Rule 9(b). Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009).

To the extent that Miller's UCL claim is premised on his allegations of fraud, they do not meet the Rule 9(b) standard and must be dismissed. Similarly, the FAC alleges that Wells Fargo's conduct is unlawful "in that it violated regulatory prescriptions

designed to protect home loan borrowers, such as Plaintiff, including but not limited to HAMP guidelines and directives." FAC ¶ 67. Although a heightened pleading standard does not apply to allegations of "unlawful" business practices, the UCL claim does not identify any particular regulation or law that Wells Fargo allegedly violated, instead stating that Wells Fargo violated prescriptions "including but not limited to HAMP guidelines and directives." This allegation is too vague and general for the Court to find Miller has stated a claim for an "unlawful" busniess practice. Even with respect to HAMP, it is unclear what specific HAMP guidelines Miller is alleging that Wells Fargo violated.

It is unclear whether Miller's UCL claim is premised on the allegations that underlie his negligence cause of action. Accordingly, Miller's UCL claim is dismissed with leave to amend.

H. Declaratory and Injunctive Relief

The FAC seeks declaratory relief in the form of a judicial declaration that the HAMP Modification Agreement is valid and legally enforceable, and injunctive relief to enjoin Wells Fargo from foreclosing on Miller's property. FAC ¶¶ 76, 78.

Wells Fargo argues that Miller cannot seek injunctive relief because he has not tendered the unpaid debt on his mortgage. Under common law, an action to set aside a wrongful foreclosure sale must be accompanied by "an offer to pay the full amount of the debt for which the property was security." Arnolds Mgmt. Corp. v. Eischen, 158 Cal. App. 3d 575, 578 (1984).

Miller has not alleged tender; accordingly, he may not seek equitable relief to set aside the foreclosure. However, to the extent that Miller is seeking relief not only under common law but

also under statute, he may be entitled to seek injunctive relief without alleging tender. HBOR provides for injunctive relief as a remedy against foreclosure if "a trustee's deed upon sale has not been recorded." Cal. Civ. Code § 2924.12(a). Here, it appears to the Court that a trustee's deed upon sale has not been recorded. Miller received a notice of sale, but it appears that no sale has yet taken place. Although the issue is unresolved, courts have held that a plaintiff may seek injunctive relief under Section 2924.12(a) whether or not there has been tender. Bingham v. Ocwen Loan Servicing, LLC, No. 13-CV-04040-LHK, 2014 WL 1494005, at *6 (N.D. Cal. Apr. 16, 2014)

Here, the FAC does not state that Miller is seeking injunctive relief under Section 2924.12(a), and the Opposition brief only argues that Miller may seek equitable relief. It is unclear whether Miller is seeking injunctive relief under statute. Due to this lack of clarity, Miller's injunctive relief claim is dismissed with leave to amend.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion is GRANTED in part and DENIED in part as follows: the promissory estoppel, fraud, UCL, and injunctive relief claims are dismissed with leave to amend. The Motion is denied in all other respects.

IT IS SO ORDERED.

Dated: August 27, 2015

DEAN D. PREGERSON
United States District Judge